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IN THE

Supreme Court of the United States

October Term, 1970

No. 1426

BENJAMIN T. DELAHAY, JR.,
Appellant,

v.

STATE OF ALASKA, *et al.*,
Appellees.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF ALASKA

APPELLANT'S BRIEF
IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

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SUBJECT INDEX

Page

Due Process Question Was Properly Presented to the Alaska Supreme Court 1

Republican Form of Government Question Was Properly Presented to the Alaska Supreme Court..... 3

The Due Process and Republican Form of Government Issues Do Present Substantial Federal Questions..... 4

Conclusion 9

TABLES OF AUTHORITY

Table of Cases

Abie State Bank v. Bryan, 282 U.S. 765..... 4

Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed. 663 (1962)....5-6, 7-8

Lovell v. City of Griffin, 303 U.S. 444 (1938)..... 5

Rogers v. Alabama, 192 U.S. 226 (1904)..... 5

Ward v. Board of County Commissioners, 253 U.S. 17.... 4

Constitutional Provisions

United States Constitution, Fourteenth Amendment..... 2

Other Authority

Alaska Statehood Act, Section 3, 85th Congress, Public Law 85-508, HR 7999, July 7, 1958 (77 Stat. 339).....6, 7

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In addition to the other authorities and arguments set forth herein, Appellant respectfully requests the Court to consider incorporated by reference herein Appellant's Jurisdictional Statement filed in this appeal, inasmuch as said statement anticipates and responds at length to most aspects of the arguments raised by Appellees in support of their motion to dismiss.

DUE PROCESS QUESTION WAS PROPERLY PRESENTED TO THE ALASKA SUPREME COURT

In their motion to dismiss, Appellees contend that the manner in which Appellant raised the due process question

to the Alaska Supreme Court was improper. Appellant raised that question by contending that

> "Any interpretation of the statutes or provisions of the Alaska Constitution in question in relation to the issues herein, contrary to Appellant's right to continuation of his term as a District Court Judge, would be so contrary to the express language and intent of the said constitutional and statutory provisions as to constitute an abuse of discretion and to amount to deprivation to Appellant of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution."

Inasmuch as Appellant raised the argument prospectively, and taking into consideration that Appellant had to assume the Alaska Supreme Court would in fact interpret the statutes and provisions of the Alaska Constitution according to their express language and intent, it is difficult to see in what manner the question could have been more explicitly raised or briefed. Appellant had the right to expect that the Alaska Supreme Court would follow the standard rules of statutory and constitutional interpretation in weighing the merits of the appeal before it.

However, the Supreme Court of the State of Alaska, as pointed out in Appellant's jurisdictional statement, abused its discretion by radically deviating from the standard rules of statutory and constitutional interpretation and in the process deprived Appellant of his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The Alaska Supreme Court's conduct in this regard consisted of its outright refusal to consider the federal questions presented before it both in briefs and in argument, and further, and more particularly, by flatly ignoring the effective date of one of the legislative acts bearing materially on the appeal and by giving said

legislative enactment effect prior to the effective date expressly established for it by the Alaska Legislature, thus evading the constitutional issue and avoiding the clear and precise provisions of the Alaska Constitution and effectively denying to Appellant the "due process" required and provided for therein.

REPUBLICAN FORM OF GOVERNMENT QUESTION WAS PROPERLY PRESENTED TO THE ALASKA SUPREME COURT

Appellees submit that the republican form of government question was not properly raised to the Alaska Supreme Court for the sole reason that Appellant therein failed to submit case law in support of his contention, but instead relied upon numerous citations from *The Federalist.*

As Appellant advised the Alaska Supreme Court in his brief and in argument, Appellant had been unable to discover a single case in which any jurisdiction has been called upon to rule upon the republican form of government question as it relates to the removal of constitutionally protected members of the judicial branch of the state government by an act of the legislative branch of that government.

When case law is not available on a question, it certainly cannot be cited in support of an appellant argument. In such instances, the court and parties are compelled to examine the source of the question, in this case the United States Constitution, and seek to discover the true meaning of its language by recourse to whatever sources other than cases may be available. In this instance, the source referred to was *The Federalist,* a most articulate and exten-

sive explanation of the various provisions of the United States Constitution as created and understood by some of the principal drafters of that document. Certainly such authority should not be lightly disregarded by any court which genuinely desires to resolve an issue before it.

In the instant case, it is apparent that the Alaska Supreme Court did not wish to resolve the republican form of government issue. Said court and Appellees are hard pressed to criticize Appellant for failing to cite authorities which are not available and to avoid the issue presented on appeal by Appellant for such specious reason.

THE DUE PROCESS AND REPUBLICAN FORM OF GOVERNMENT ISSUES DO PRESENT SUBSTANTIAL FEDERAL QUESTIONS

As noted in Appellant's jurisdictional statement, the due process of law issue presents a substantial federal question for the reason that the rights of the individual would be utterly meaningless if the highest state court can with impunity, and safe from review by the United States Supreme Court, violate the fundamental rules of statutory and constitutional construction as it suits that court's whim or convenience.

The jurisdiction of this Court is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support," *Ward v. Board of County Commissioners,* 253 U.S. 17, 22. It thus becomes the duty of this Court to ascertain,

> ". . . in order that constitutional guaranties may appropriately be enforced, whether the asserted nonfederal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan,* 282 U.S. 765, 773.

In *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938), after reciting that the state court said the charge that the ordinance was void because it violated a designated provision of the state or federal constitution without stating wherein there was such a violation was too indefinite to present a constitutional question, this Court held it had jurisdiction, stating:

> "We think that this question was adequately presented and was decided in the instant case. Whether it was so presented and was decided is itself a federal question." [case citations omitted]

In *Rogers v. Alabama*, 192 U.S. 226, 230 (1904), Justice Holmes stated:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

How much more substantial can the due process issue be than when the highest court of the state itself deprives an individual of his right to due process of law?

With regard to the republican form of government issue, Appellees contend that this guarantee is political in nature and is therefore not justiciable. In response to this contention, Appellant directs the Court's attention to *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed. 663 (1962), wherein this Court addressed itself to the question whether the republican form of government guarantee applies to the manner in which states apportion themselves for the purpose of electing their representatives and government. Although the Court held that, in that instance, the claim pleaded did not rest upon the guarantee clause, the Court pointed out:

"Of course the mere fact that the suit seeks protection

of a political right does not mean it presents a political question." 7 L.Ed.2d, at 681.

The Court went on to note:

> "We have said that 'In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination are dominant considerations.' (cases cited) The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political doctrine question." 7 L.Ed.2d at 682.

As raised in the instant case, the republican form of government issue does not involve a political question. In relation to the instant case, it is not appropriate under our system of government to attribute finality to the action of the political departments in terms of their ability to terminate constitutionally protected members of the judicial branch. Furthermore, in the instant case, in many respects Appellant's interest in this litigation is secondary to the right of the people of the State of Alaska to the guarantee and exercise of a republican form of government in the State. The Alaska Statehood Act, Public Law 85-508, 85th Congress, HR 7999, July 7, 1958 (77 Stat. 339), Section 3, sets forth the Congressional mandate, and conditions for admission

into the Union of the State of Alaska:

> "The Constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

Such a constitution was adopted by the electorate of Alaska and recognized and accepted by the proper constitutional authority (Congress of the United States), containing provisions protecting the citizens of Alaska from coercion or undue pressures on the judiciary by legislative or executive acts and the *preservation* of this form of government against erosion by legislative acts *is* a proper and necessary function of this Court's jurisdiction.

The Court in *Baker v. Carr* goes on:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of the powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of political questions presence. The doctrine of which we treat is one of 'political questions', not one of 'political cases.' The

> Court cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." 7 L.Ed.2d at 685-86.

In the instant case, none of the formulations set forth by this Court in *Baker* is "inextricable" from the case at bar. In fact, the republican form of government issue has never been raised in the particular context it is raised herein. Inasmuch as *Baker* reaffirms that "discriminating inquiry into the precise facts and posture of the particular case" is required on review, the Alaska Supreme Court had, and this Court now has, the obligation to make such an inquiry into the merits of this appeal.

Past decisions of this Court refusing to consider questions involving the Guaranty Clause have concerned cases where the Court was asked to intervene and determine the propriety of the manner in which a legislature performed actions within the realm of legislative power or the executive performed executive functions. The Court has deliberately refused to "intermeddle" in such actions.

The issue now before the Court involves a hitherto unraised application of the Guaranty Clause to attempts of other branches of government to emasculate the judicial branch in defiance of the constitutional mandate for separation of powers. Such a new application of the Guaranty Clause deserves a fresh and careful evaluation by this Court.

CONCLUSION

Appellant submits, based on the foregoing and on its previously filed jurisdictional statement, that the due process and republican form of government issues raised by Appellant herein do present substantial federal questions, and that therefore the United States Supreme Court should accept jurisdiction of this appeal.

DATED this 7th day of April, 1971.

Respectfully submitted,

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